

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

AMBER BROOKS)	
Claimant)	
VS.)	
)	Docket No. 1,063,394
SAINT RAPHAEL HOME CARE, INC.)	
Respondent)	
AND)	
)	
ULLICO CASUALTY CO.)	
Insurance Carrier)	
AND)	
)	
WESTERN GUARANTY FUND)	
Insurance Carrier)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant requests review of the May 23, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Additionally, respondent requests review of the August 29, 2013, preliminary hearing Order entered by ALJ Clark. Although the ALJ issued separate Orders on different dates, the Board finds it unnecessary to issue separate Orders, therefore the Board will determine both in this Order.

APPEARANCES

Joni J. Franklin, of Wichita, Kansas, appeared for the claimant. Brent M. Johnston, of Kansas City, Kansas, appeared for respondent and its insurance carrier. Mark Marion, of Topeka, Kansas appeared for the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The record consists of the May 23, 2013, transcript of the preliminary hearing, with exhibits attached; and the August 29, 2013, transcript of the preliminary hearing, with

exhibits attached, and the documents of record filed with the Division of Workers Compensation (Division).

ISSUES

In the Order of May 23, 2013, the ALJ denied claimant's request for benefits, finding the proceedings against respondent and its insurance carrier were stayed. The Order of the ALJ dated May 23, 2013, upheld the 180 day stay, denying claimant the right to proceed against respondent and its insurance carrier. No testimony was presented at this hearing. There was no indication as to the financial ability of respondent to pay the benefits requested. The Kansas Workers Compensation Fund (Fund) was present and ordered to pay the costs associated with the hearing.

The claimant requests review of whether the ALJ erred in allowing a defense by the respondent employer due to a court injunction regarding only the respondent's insurance carrier. Claimant contends the denial of benefits was based on instructions by the Director of the Division not to hear the claimant's preliminary hearing requests on a properly noticed claim, due to a 180 day stay issued by the Court of Chancery of the State of Delaware. Claimant argues the ALJ erred in denying her preliminary requests.

Respondent argues the ALJ erred in even holding a preliminary hearing and in issuing an order in this claim when there was a 180 day stay in effect. Respondent also contended the Board does not have jurisdiction over this appeal.

The Fund argues the Order should be affirmed and proceedings stayed since, at the time of the hearing, it had not been determined that respondent was uninsured and/or could not pay. The Fund contends there was no need to implead the Fund at that time.

The issue on appeal from that Order is whether the ALJ erred in ruling proceedings against Ullico and respondent are stayed.

In the August 29, 2013, Order, the ALJ found claimant was injured out of and in the course of her employment with respondent on November 12, 2012, while assisting a patient out of a wheelchair. Dr. John Osland was authorized as the claimant's treating physician, and all medical was ordered paid, including reimbursement for medical expenses paid by claimant and expenses from Galichia Heart Hospital. The examination by Dr. George Fluter was ordered paid as unauthorized medical treatment up to the statutory limit. Finally, temporary total disability payments were ordered paid, beginning December 22, 2012, until the claimant is released. All benefits were assessed against the Respondent, Saint Raphael Nursing Services, and its carrier, Western Guaranty Fund.

The respondent requests review of whether the ALJ exceeded his authority by allowing the August 29, 2013, preliminary hearing to proceed despite the Liquidation and Order with Bar Date entered by the Court of Chancery of the State of Delaware on May 30,

2013; whether claimant sustained a personal injury arising out of and in the course of her employment with respondent; and whether claimant met her burden of proving that her alleged work accident was the prevailing factor in causing her injury, medical condition, and need for treatment. Respondent argues the ALJ's Order should be nullified and reversed, first because the ALJ exceeded his authority; second, claimant failed to offer any credible and competent evidence suggesting the November 12, 2012, accident was the prevailing factor in causing her injuries and her medical condition, and finally, because Dr. Fluter's report should not be deemed competent or credible evidence as he did not have access to claimant's prior medical records and was provided false information by claimant regarding prior injuries and medical conditions.

Claimant argues the ALJ's August 29, 2013, Order should be affirmed.

The issues on appeal from the August 29, 2013, Order are as follows:

1. Whether the ALJ exceeded his authority by allowing the August 29, 2013, preliminary hearing to proceed, despite the Liquidation and Order with Bar Date entered by the Court of Chancery of the State of Delaware on May 30, 2013;
2. Whether claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent;
3. Whether claimant met her burden of proving that her alleged work accident was the prevailing factor in causing her injury, medical condition, and need for treatment.

At the May 23, 2013, preliminary hearing, the parties and the ALJ discussed a Rehabilitation and Injunction Order issued by the Court of Chancery of the State of Delaware which declared Ullico Casualty Company insolvent. The Receiver appointed by the Court was vested with the right, title and interest in all funds of Ullico. An Order issued by the Court Vice Chancellor dated March 11, 2013, stayed any and all actions involving Ullico Casualty and any party Ullico Casualty was obligated to defend or any party insured by Ullico Casualty, for a period of 180 days.

A Verified Petition for Entry of Liquidation and Injunction Order with Bar Date (Verified Petition) was filed on May 16, 2013, with the Court of Chancery of the State of Delaware. This document requested the entry of a Liquidation and Injunction Order with Bar Date petitioning the Court for a declaration that Ullico Casualty was insolvent. A Liquidation and Injunction Order with Bar Date was also filed with the Court of Chancery on May 16, 2013, reiterating the 180 day stay and declaring Ullico Casualty insolvent. The Verified Petition stated:

“ . . . the entry of a liquidation order with a finding of insolvency is expected to trigger the involvement of guaranty associations or similar funds and afford some statutory coverage under the enabling statutes for each such association or fund for

many of the policy claims against ULLICO CASUALTY. . . . The Receiver believes that many of the enabling statutes would provide the workers compensation claimants with substantial if not full coverage.”¹

The preliminary hearing held on August 29, 2013, was to litigate the compensability of claimant’s alleged injury to her back, neck and right shoulder. Respondent counsel continued to object to the hearing as 180 days had not yet passed from the date of the liquidation order for Ullico Casualty. Respondent’s objection was overruled and the hearing proceeded to the Order issued on August 29, 2013.

FINDINGS OF FACT

Claimant began working for respondent, as a CNA, at the end of October 2012. On November 12, 2012, while assisting a client from a wheelchair, claimant heard a pop in her back or shoulder. Claimant reported the incident and was sent to Minor Emergency, but it was closed. She proceeded to go to Galichia Hospital for treatment. Claimant reported she had pain in her lower back and right shoulder, with the back being worse than the shoulder. She was taken off work and when she turned the paperwork into respondent she was sent to Dr. Dobyms. Claimant met with Dr. Dobyms on November 14, 2012. She reported to Dr. Dobyms that, while bending over to assist a patient out of a wheelchair, she heard a loud pop in her back and couldn’t move for a few minutes. Claimant alleges she also reported right shoulder pain, but did not receive any treatment for it because Dr. Dobyms only deals with backs. Dr. Dobyms’ records from that date fail to mention claimant’s shoulder complaints. Claimant was off work for seven days and went back to Dr. Dobyms on November 21, 2012, with ongoing low back complaints. Again, there was no mention of shoulder pain. She was released back to work with lifting restrictions. Claimant submitted those restrictions to respondent and was told that she would not be accommodated.

Claimant returned to Dr. Dobyms on December 5, 2012, with the same complaint of low back pain and new complaints involving her mid back, her bilateral shoulders, with the right being worse than the left, and numbness in her entire right arm. She denied any new injury, but Dr. Dobyms indicated claimant’s shoulder complaints were new since their last visit and noted claimant had not been working. Claimant displayed “tenderness just about anywhere she is palpated.”² Dr. Dobyms opined claimant needed an MRI of the right shoulder and ordered physical therapy. Claimant again returned to Dr. Dobyms on January 30, 2013, and was diagnosed with lumbar strain and right shoulder sprain. Claimant was returned to work with restrictions. Respondent was still not able to accommodate claimant.

¹ P.H. Trans. (May 13, 2013), Resp. Ex. 1 at 11.

² P.H. Trans. (Aug. 29, 2013), Cl. Ex. 2 at 5.

Claimant had an MRI of the right shoulder on February 22, 2013. The MRI displayed a partial bursal surface tear superimposed on tendinosis, a partial tearing of the superior glenohumeral ligament, a possible tear of the rotator cuff capsule and moderate degenerative changes in the AC joint. When claimant went to Dr. Osland, he opined she needed surgical correction of her right shoulder, and assigned additional restrictions. Claimant did not have surgery. Her last day of work was on or about December 22, 2012. She had not done anything that would have caused her condition in her right shoulder or neck to get worse. Claimant believes the neck pain is from shoulder pain radiating into her neck.

Claimant admits to a prior work injury on October 31, 2005, where she sustained a work injury to her shoulders while working for Twin Rivers Group Home (Docket No. 1,028,345). She was assigned a 10 percent permanent partial disability to her bilateral upper extremities. Claimant entered into a settlement for this claim for \$12,500.

Claimant admits to another prior work injury on January 22, 2007, while in the employment of House of Hope (Docket No. 1,033,037). That injury occurred as she was walking out of a patient's home and slipped and fell on the ice. This resulted in a bulging disc in her neck. She does not recall an injury to her back or right shoulder from this incident. She was able to return to full duty after this incident. Claimant filed a claim for this injury and received a \$5,000 settlement for an 8 percent whole body impairment.

Claimant testified that after her benefits with respondent were terminated, she sought treatment at the Galichia Heart Hospital emergency room for treatment for her back. She went to Galichia because she could barely walk and she felt like she had pulled something in her back. The pain she was having was the same as she had been having after her accident and was constant in the low back and right shoulder. Claimant did not report any other accidents, injuries or re-injuries at these visits. Claimant continues to have constant pain in the low back and the right shoulder with the low back hurting more than the shoulder.

The only medical treatment claimant sought recently has been for her diabetes, at which time she discussed her overall physical condition. Claimant testified that she was asked about other complaints at these visits but at the time she claimed no other complaints. Claimant testified that the first diagnosis she was given of any tears in her shoulder was after the November 12, 2012, accident. Claimant argues that the medical evidence supports claimant's position regarding causation. No evidence to the contrary has been presented.

Claimant met with Dr. George Fluter for an examination, at the request of her attorney, on February 18, 2013, with complaints of right shoulder and upper back, middle and lower back pain, and numbness affecting the ring and little fingers on the right hand. Claimant described the pain as severe aching and burning. She reported bending and twisting made the pain worse. She had undergone various forms of treatment, all of which

provided no relief. The history provided to Dr. Fluter indicated claimant had suffered no prior injuries to, or problems with, the affected areas of her body. The history also indicated the pop experienced on the November 12, 2012, date of accident, may have been in the right shoulder.

Dr. Fluter examined claimant and opined she was status post work-related injury; had neck/upper back/right shoulder girdle pain; cervicothoracic strain/sprain; right shoulder pain/impingement/tendinitis/bursitis; possible right shoulder internal derangement; low back pain; lumbosacral strain/sprain; probable sacroiliac joint dysfunction; and probable trochanteric bursitis. Dr. Fluter opined there is a causal/contributory relationship between claimant's current condition and the reported work-related injury. He went on to find that the prevailing factor for the injury and the need for medical evaluation/treatment is the work-related injury from November 12, 2012. Dr. Fluter assigned restrictions on a temporary basis and recommended additional scans and medication.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

(f)(1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2012 Supp. 44-508(g) states:

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The Board has not, to date, had the opportunity to address the effect of a stay imposed in a state ordered liquidation proceeding. However, the State of Kansas requires that full faith and credit be given to injunctions when said injunctions are involved in an order to liquidate an insurer doing business in this state.³ Additionally, the stay applies not only to the company being liquidated, but, according to the terms of the injunction, to any party that Ullico Casualty, the liquidated company, was obligated to defend, i.e. the respondent in this action. The Board has held that it does not have jurisdiction to determine actions when a stay in bankruptcy has been placed into effect, even when the Fund has been implead. The same rules would apply where an injunction has been ordered during the liquidation of an insurance company.

³ K.S.A. 40-3627(a) Furse 2000.

The Kansas Court of Appeals upheld the Board's determination that it did not have jurisdiction to consider the merits of a claim when a bankruptcy stay was in effect. In *Miner*⁴, the Court determined that neither the ALJ, nor the Board erred in refusing to consider the merits of a claim when a stay was in effect. The Court went on to determine that the Fund's liability was not ascertainable when there was no evidence that the respondent CX, was unable to pay Miner's and Trim's claims. The Court held that the parties were obligated to proceed through the bankruptcy process before receiving compensation.

K.S.A. 40-2916 Furse 2000 states:

All proceedings in which the insolvent insurer is a party in any court in this state shall be stayed for sixty (60) days from the date the insolvency is determined to permit proper defense by the association of all pending causes of action. As to any covered claims arising from a judgment under any decision, verdict or finding based on the default of the insolvent insurer or its failure to defend an insured, the association either on its own behalf or on behalf of such insured may apply to have such judgment, order, decision, verdict or finding set aside by the same court or administrator that made such judgment, order, decision, verdict or finding and shall be permitted to defend against such claim on the merits.

Here, at the time of the first Order, the stay remained in effect. While it is clear the Receiver had issued an Order finding Ullico Casualty to be insolvent, and indicated a clear objective of having guarantee associations defend the claim on respondent's behalf, K.S.A. 40-2916 Furse 2000 requires a 60 day stay from the date the insolvency is determined to permit a proper defense by an association of the pending causes of action. Therefore, the ALJ was correct that the stay remained effective at the time of the initial Order on May 23, 2013. The ALJ did not have jurisdiction to consider the matter.

K.S.A. 2012 Supp. 44-534a(a)(2) states:

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered

⁴ *Miner v. CX Transportation*, 33 Kan. App. 2d 106, 97 P.3d 1069 (2004), *rev. denied* 278 Kan. 846 (2005).

without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. **A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.** Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts. (b) If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a, and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award. (Emphasis added)

The Board also has no jurisdiction to consider the ALJ's determination in the Order of May 23, 2013, based upon the finding in *Miner*, and the restrictions in K.S.A. 2012 Supp. 44-534a. Claimant's appeal of the May 23, 2013, Order is dismissed.

The Board must next consider the Order of August 29, 2013. The ALJ did not apply the stay to this request, although the 180 day stay period had not expired. It is apparent from the Verified Petition, the Receiver expected guarantee associations to step into the

shoes of the insurance company and protect respondent's position in this workers compensation matter. With the entry of Western Guaranty Fund in this matter, respondent's interests were properly represented.

K.S.A. 40-2916 Furse 2000 requires the stay continue for 60 days from the date the insolvency is determined in order to permit a proper defense by the association. The Liquidation and Injunction Order with Bar Date was filed on May 16, 2013. The 60 day stay requirement of the statute was satisfied as of July 15, 2013. The hearing on August 29, 2013, was timely and proper. The Board finds the ALJ did not exceed his jurisdiction by allowing the hearing to proceed.

Claimant's description of the accident is uncontradicted in this record. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.⁵

The Board finds claimant has proven, for preliminary hearing purposes, that she suffered an injury by accident on November 12, 2012. The only opinion dealing with whether the accident was the prevailing factor causing the injury, medical condition, and resulting disability or impairment is that of Dr. Fluter. While it is apparent Dr. Fluter was not provided a full history of claimant's past injuries, it is persuasive to this Board Member that claimant was able to work from 2007, her last date of preexisting problems, until the November 12, 2012, accident date without medical treatment or restrictions. This Board Member cannot find that claimant's prior injuries significantly impacted her current injury or medical condition. This Board Member finds the Order of the ALJ dated August 29, 2013, should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Orders should be affirmed. The ALJ properly ruled that the 180 day stay from the Court of Chancery from the State of Delaware, prohibited a hearing on this workers compensation matter on May 23, 2013, in Kansas. In addition, the ALJ did not exceed his jurisdiction on August 29, 2013, when he determined the stay no

⁵ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

⁶ K.S.A. 2012 Supp. 44-534a.

longer applied and allowed claimant's request for temporary total disability compensation and medical treatment to be determined. Finally, claimant satisfied her burden that she suffered an accident and resulting injury on November 12, 2012, which arose out of and in the course of her employment with respondent, and that accident is the prevailing factor causing the injury, medical condition and current need for medical treatment. The August 29, 2013, Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated May 23, 2013, remains in full force and effect, and the Order of August 29, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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